Supreme Court, U.S.
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No. 1385

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNION OIL COMPANY OF CALIFORNIA, PETITIONER

v.

TIM HAMILTON, ET AL., RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when the parties have settled a case pending appeal on condition that the judgment of the district court be vacated, the federal courts should honor that condition, vacate the judgment, and eliminate its collateral estoppel effects.

2. Whether a judgment that has been vacated may serve as a source of offensive collateral estoppel.

RULE 14.1(b) AND 29.1 STATEMENT

In addition to those listed in the caption, the other parties to the proceeding are: respondents Clifford Houser, Bobby Martin, Randy Schatz, Dennis Trulock, and Pat Waters.

Petitioner Union Oil of California is a wholly owned subsidiary of Unocal Corporation. Petitioner's only subsidiary that has issued shares to the public is Unocal Exploration Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 14.1(b) AND 29.1 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION	1
RULE INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5

TABLE OF AUTHORITIES

CASES: Page

Amos v. *Union Oil Co.*, 663 F. Supp. 1027 (D. Or. 1987) 2

Chemetron Corp. v. *Business Funds, Inc.*, 682 F.2d 1149 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983) 3

Ringsby Truck Lines, Inc. v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982) 4

RULE:

Fed. R. Civ. P. 60(b) 1, 2, 3

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-8a) and of the district court (App., *infra*, 9a-43a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1991. A timely petition for rehearing was denied on December 2, 1991 (App., *infra*, 44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal

> representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT

The questions presented in this case are identical to those raised in the petition for a writ of certiorari in *Union Oil Company of California* v. *Bates*, which is being filed simultaneously with this petition. This petition accordingly should be considered along with the *Bates* petition; if certiorari is granted in *Bates*, this case should be held for disposition in light of *Bates*.

1. Much of the background to this case is set out in the *Bates* petition. Briefly, 45 retail dealers of petitioner Union Oil of California ("Unocal") brought suit against the company, contending that they had been damaged by Unocal's decision to reduce the octane of certain of its fuel and to cease the sale of leaded premium gasoline. See *Bates* App. 2a-4a, 16a-18a.[1] The jury in that action, captioned *Amos* v. *Union Oil Co.*, 663 F. Supp. 1027 (D. Or. 1987), found for the plaintiffs and awarded them a judgment against Unocal. See *Bates* App. 3a-4a, 18a.

While the *Amos* case was pending on appeal, Unocal and the dealers agreed to a settlement, under which Unocal would pay a substantially reduced sum

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[1] "*Bates* App." refers to the appendix to the petition for certiorari in *Bates*.

to the plaintiffs and would withdraw its appeal, and the parties would obtain a vacatur of the district court's judgment. Unocal made clear at the time that it believed it had a substantial chance of prevailing on appeal; it emphasized that vacatur of the district court judgment was a nonnegotiable condition for settlement. See *Bates* E.R. 104-108, 119-121.[2] When the district court indicated that it would be willing to grant the vacatur (see *id.* at 114), Unocal, with the concurrence of the plaintiffs, moved the court of appeals to remand the case so that the district court could entertain a motion to vacate the *Amos* judgment pursuant to Fed. R. Civ. P. 60(b). *Bates* E.R. 111.

In the brief accompanying this motion, Unocal advised the court of appeals of its concern that, if the *Amos* judgment were not vacated, future plaintiffs might attempt to use it against Unocal as a source of collateral estoppel. In voicing this concern, Unocal pointed to the holding in *Chemetron Corp.* v. *Business Funds, Inc.*, 682 F.2d 1149, 1187-1192 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983), that "if a defendant settles a case after trial, a stranger to the litigation may assert offensive collateral estoppel in a second suit brought against the same defendant." *Bates* E.R. 113. Unocal noted that, "if the district court vacates the judgment below, under Rule 60(b), the opportunity of future litigants to invoke the '*Chemetron* rule' against Union will be diminished." *Ibid.* In response, the court of appeals remanded the case "to allow the district court to rule upon a motion under Fed. R. Civ. P. 60(b)." *Bates* App. 32a. On remand, the district court granted the

[2] "*Bates* E.R." refers to appellant's excerpts of record in the court of appeals in *Bates*.

motion, ordering that the *Amos* judgment "shall be and is hereby vacated and set aside in its entirety." *Id.* at 34a.

2. Shortly after the settlement and vacatur in *Amos*, respondents in this action, six other Unocal dealers in the Pacific Northwest, brought suit against Unocal in the United States District Court for the Western District of Washington, stating claims similar to those that had been at issue in *Amos*. Respondents sought summary judgment, invoking the *Amos* judgment as a source of collateral estoppel. Unocal responded that a vacated judgment should not and could not be given collateral effect.

The district court ruled for respondents, relying entirely on *Chemetron* and the district court's decision in *Bates*. App., *infra*, 32a-35a. The court in this action recognized that applying collateral estoppel in such circumstances "may have a chilling effect on post-trial settlement, particularly where a potential plaintiff is waiting on the sideline. Nevertheless, the court concludes that this policy concern is outweighed by the public interest in judicial finality." *Id.* at 35a. The issue of damages was tried to a jury, which returned verdicts totaling in excess of $250,000.

The court of appeals affirmed. App., *infra*, 1a-8a. The court applied its holding in *Bates* that "when a district court fails to perform the balancing test [required by *Ringsby Truck Lines, Inc.* v. *Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982)], a subsequent district court may weigh the *Ringsby* factors and determine for itself the preclusive effect of the vacated judgment." App., *infra*, 3a. Here, the court added, the district judge "correctly determined that collateral estoppel could flow from the vacated *Amos* judgment." *Ibid.* The court of appeals went on to hold that the district judge did not abuse her dis-

cretion in applying collateral estoppel here. *Id.* at 3a-7a.

REASONS FOR GRANTING THE PETITION

The issues in this case are identical to those presented in *Bates*. The decisions in both cases held that the parties are not entitled to enter into post-judgment settlements that preclude use of the judgment as a source of collateral estoppel. And the decisions in both cases hold that vacated judgments may serve as a source of collateral estoppel.

This petition accordingly should be disposed of as appropriate in light of the Court's action on the petition in *Bates*. If that petition is granted, this one should be held and disposed of as appropriate in light of the outcome in *Bates*.

Respectfully submitted.

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FEBRUARY 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-35426

D.C. No. CV-88-1233-BJR

TIM HAMILTON; CLIFFORD HOUSER; BOBBY MARTIN; DENNIS TRULOCK; PAT WATERS; THE LANE GROUP, INC.,
Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted June 5, 1991
Seattle, Washington

Before: WRIGHT, FARRIS and THOMPSON,
Circuit Judges.

MEMORANDUM *

[Filed Sep. 17, 1991]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

INTRODUCTION

Union Oil Company of California (Unocal) appeals the application of collateral estoppel to a judgment vacated pursuant to settlement. Unocal first contends the judgment lost its preclusive effect upon vacatur. In the alternative, Unocal contends the district court abused its discretion by applying collateral estoppel from the vacated judgment. We affirm.

FACTS AND PROCEEDINGS

In the first action, *Amos v. Union Oil Co.*, 663 Fed. Supp. 1027 (D. Or. 1987), forty-five Unocal oil dealers sued Unocal for fraud and breach of an implied covenant of good faith and fair dealing. The jury found in favor of the plaintiffs, and Unocal appealed. While the appeal was pending, Unocal settled the case and sought vacatur of the judgment as a condition of settlement. The district court vacated the judgment without commenting on the preclusive effect of the vacated judgment.

In the present case, six Western Washington dealers ("*Hamilton* plaintiffs") sued Unocal for breach of an implied covenant of good faith and fair dealing, fraud, and violation of Washington's Consumer Protection Act ("CPA"). These claims were based on the same conduct involved in *Amos*. The breach of an implied covenant claim concerned Unocal's sudden switch from 89 octane fuel to 87 octane fuel. The fraud and CPA claims involved Unocal's substitution of unleaded premium fuel for leaded premium fuel without notifying the dealers or the public.

The *Hamilton* plaintiffs moved for summary judgment on the implied covenant, fraud, and CPA claims. The district court granted plaintiffs' motion

and applied offensive collateral estoppel to the vacated *Amos* judgment. The jury awarded damages to the plaintiffs, and this appeal followed.

DISCUSSION

A. Collateral Estoppel

Unocal first contends the *Amos* judgment lost its preclusive effect upon vacatur and, therefore, offensive collateral estoppel was not available. We disagree. In a companion case, *Bates v. Union Oil Co.*, No. 90-35199, we held that a judgment vacated pursuant to settlement can have preclusive effect notwithstanding the fact that the record fails to disclose that the vacating district court performed the balancing test required by *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982). We held in *Bates* that when a district court fails to perform this balancing test, a subsequent district court may weigh the *Ringsby* factors and determine for itself the preclusive effect of the vacated judgment.

In the present case, the *Hamilton* plaintiffs sought the application of offensive collateral estoppel to the vacated *Amos* judgment. District Court Judge Rothstein weighed the *Ringsby* factors and found the balance tipped in favor of finality of judgments. Clerk's Record 81, at 27. Judge Rothstein correctly determined that collateral estoppel could flow from the vacated *Amos* judgment. *See Bates*, pp. 2-5.

Nevertheless, Unocal argues the district court abused its discretion by applying collateral estoppel and resolving liability issues against it.

To apply collateral estoppel, there must be an identity of issues between the *Amos* case and the

present case. *See Shapley v. Nevada Bd. of State Prison Comm'r*, 766 F.2d 404, 408 (9th Cir. 1985) (holding application of collateral estoppel requires identity of issues). Unocal contends that the issue of its liability on the implied covenant claim in *Amos* is not identical to that issue in this case. Unocal presents three alleged distinctions which it contends prevent the application of collateral estoppel.

First, Unocal argues the affidavit of a Unocal employee establishes that, although Unocal did not discuss its marketing changes with the *Amos* dealers, Unocal did discuss these changes with the Washington dealers. As noted by the district court, this affidavit is vague and does not specifically state that Unocal discussed its marketing changes or informed the dealers when Unocal would discontinue the 89 octane fuel. Second, Unocal argues it did not employ misleading advertising in Washington. This is irrelevant because the *Amos* judgment did not involve allegations of misleading advertising. The breach of an implied covenant action in *Amos* and in this case involve Unocal's sudden switch to a commonplace product without warning, marketing studies, or promotion. Third, Unocal alleges the fuel prices in Washington were different from the Oregon fuel prices. Again, this is irrelevant because the findings concerning breach of the implied covenant involve Unocal's failure to reduce its prices upon its sudden switch to 87 octane fuel. As the district court noted in its summary judgment ruling, the plaintiffs presented *uncontradicted* evidence that Unocal reduced the quality of its fuel without reducing the price in Western Washington and Oregon. We, therefore, conclude the issues concerning the implied covenant claim are identical.

Unocal also argues the district court abused its discretion by applying collateral estoppel because it deprived Unocal of an opportunity to present favorable witnesses in this case. This argument is without merit. *See Bates*, pp. 10-11.

It may be unfair to apply collateral estoppel if the first action deprived the party of procedural opportunities that are available in the second action and that "could readily cause a different result." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Unocal had a full and fair opportunity, however, to engage in discovery and present a defense in *Amos*. Further, the testimony of Unocal's favorable witnesses would not produce a different result. This testimony is limited to statements by dealers who have already settled with Unocal that, in their own opinion, Unocal gave them timely notice of the fuel changes.

Unocal argues the district court erred by using collateral estoppel to establish Unocal's liability for fraud because, allegedly, the plaintiffs did not present evidence that the invoices falsely stated the fuel was leaded or that the plaintiffs relied on the false invoices or any other representations that the fuel was leaded. This argument also lacks merit.

The district court noted that Unocal did not deny the invoices falsely stated the fuel was leaded. In their complaint, the plaintiffs alleged they relied on false representations by Unocal that Unocal was delivering leaded rather than unleaded fuel. Unocal, however, asserts plaintiff Dennis Trulock testified he knew the fuel was unleaded and plaintiff Bobby Martin testified he did not read the invoices.

We are not persuaded by this argument. The record reflects that Trulock became confused as to exact dates during questioning by Unocal's counsel and, in fact, testified he did not know the fuel was unleaded. As to Martin, although he may not have read the invoices, he could reasonably assume that when Unocal filled the tank for the pump labeled "leaded" it filled the tank with leaded fuel.

Finally, Unocal argues it was unfair to apply collateral estoppel to the Consumer Protection Act ("CPA") claim because Unocal did not have the opportunity to present a reasonableness defense to the jury. The district court granted summary judgment because it found no reasonable jury could conclude Unocal's conduct was reasonable.

The CPA claim was based on Unocal's substitution of unleaded for leaded premium without notifying the dealers or the public and its denial of rumors of the substitution. Section 19.86.920 of the CPA states that acts which are "reasonable in relation to the development and preservation of business or which are not injurious to the public" do not violate the CPA. Wash. Rev. Code § 19.86.920 (1989). This section acknowledges that businesses should have "some latitude to conduct their trade," and actions "motivated by legitimate business concerns" will not violate the section. *State v. Black*, 100 Wash. 2d 793, 803, 676 P.2d 963, 969 (1984).

Here, Unocal's conduct was not reasonable. The record does not support its assertion that it notified Washington dealers of the substitution. Furthermore, even though the substitution of leaded fuel was

legally required, Unocal was not required to deceive the dealers and the public.

B. Emotional Distress Damages and Sufficiency of the Evidence

Unocal argues the emotional distress damage award was erroneous because the *Hamilton* plaintiffs failed to present evidence of objective symptoms or that their level of distress exceeded that which is "a fact of life." Washington, however, does not require this proof. *Nord v. Shoreline Sav. Ass'n*, 116 Wash. 2d 477, 805 P.2d 800, 804-05 (1991). To recover emotional distress damages for an intentional tort, a plaintiff must only prove "actual anguish or emotional distress." *Id.* at 804.

Unocal challenges the jury's award of emotional distress damages to Dennis Trulock because Trulock testified he knew the fuel was unleaded. Again, this argument is without merit. Trulock testified he did *not* know the fuel was unleaded, and the district court found he simply became confused as to exact dates during questioning by Unocal's counsel.

C. Attorney Fees

The plaintiffs seek and are entitled to attorney fees on appeal. Wash. Rev. Code § 19.86.090 (1989); *Mason v. Mortgage America, Inc.*, 114 Wash. 2d 842, 856, 792 P.2d 142, 149 (1990); *McRae v. Bolstad*, 101 Wash. 2d 161, 168, 676 P.2d 496, 501 (1984). We remand the case to the district court for the determination of reasonable attorney's fees on appeal.

CONCLUSION

The district court correctly determined that collateral estoppel could be applied based upon the vacated *Amos* judgment, and it did not abuse its discretion in applying collateral estoppel to the liability issues in this case.

The judgment of the district court is AFFIRMED. This case is remanded to the district court for the determination of reasonable attorney fees on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C88-1233R

CLIFFORD HOUSER, TIM HAMILTON, BOBBY MARTIN, RANDY SCHATZ, DENNIS TRULOCK, and PAT WATERS,
Plaintiffs,

v.

UNION OIL COMPANY OF CALIFORNIA, d/b/a UNOCAL, a California corporation,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

[Received Oct. 25, 1989]

THIS MATTER comes before the court on plaintiffs' and defendant's motions for partial summary judgment. Having reviewed the motions, together with all documents filed in support and in opposition, and having heard argument, the court finds and rules as follows:

I

INTRODUCTION

This lawsuit grows out of the dealings, during 1985 and 1986, between defendant Union Oil Company

("Unocal") and certain Western Washington and Western Oregon gasoline retailers. In 1987, a group of over forty Unocal dealers brought suit against Unocal regarding Unocal's "Northwest Grade Strategy." *See Amos v. Union Oil Co. of California*, 663 F. Supp. 1027 (D. Or. 1987). After a bifurcated trial, the jury returned a plaintiffs' verdict of $7.6 million. *Id.* To facilitate settlement of this case and to avoid a costly appeal, Judge Panner vacated the final judgment in *Amos*. Nevertheless, when a second group of Unocal dealers initiated a similar lawsuit, Judge Panner refused to permit Unocal to relitigate issues tried in *Amos*. *See Bates v. Union Oil Co. of California*, Case No. 88-0280-PA (D. Or. Mar. 16, 1989).

Plaintiffs, a group of six Western Washington gasoline retailers [1], bring this action against Unocal. Plaintiffs now move for partial summary judgment by estoppel. Unocal opposes the motion, and moves for partial summary judgment regarding several additional issues.

II

FACTUAL BACKGROUND

A. *Unocal-Dealer Relations.*[2]

Unocal, a California corporation, sells gasoline and related products to service stations throughout the United States. There are approximately 170 Unocal

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[1] Plaintiffs Clifford Houser, Randy Schatz, Dennis Trulock, and Pat Waters continue to operate as Unocal dealers, while plaintiffs Tim Hamilton and Bobby Martin do not.

[2] A thorough recitation of the facts surrounding this suit may be found in the Judge Panner's decisions in *Amos* and *Bates*.

service stations in Washington, all of which are operated by independent dealers. To become a Unocal dealer, each retailer must execute several contractual documents, most significantly a Retail Dealer Motor Fuel Purchase Contract ("Fuel Contract") and a Service Station Lease ("Lease").

Over the course of many years, Unocal has positioned itself and its dealers at the upper tier of the gasoline services industry, emphasizing unique products, clean stations, and good service. To maintain its niche in the marketplace, Unocal has advertised and promoted quality and the uniqueness of its products, and established a training course for its dealers.

During the 1970s, most oil companies offered leaded regular, unleaded regular, and a premium gasoline; Unocal, however, discontinued selling leaded regular gasoline and decided instead to market two grades of gasoline: an 89 octane unleaded regular and a 91 octane leaded premium. Each of Unocal's offerings were unique in the marketplace. First, most brands of unleaded gasoline were 87 octane or less. Unocal's product, without a lead additive and at the higher 89 octane, enhanced the performance of some vehicles. Second, by the end of 1985, no other major oil company sold leaded premium gasoline. Unocal's leaded product was particularly desirable for high-performance engines, such as those used in race cars and motorcycles.

During 1985 and 1986, Unocal adopted a "Northwest Grade Strategy," by which it intended to (1) reduce its unleaded regular to 87 octane and (2) replace its leaded premium with unleaded premium. Describing the evidence presented to the jury in *Amos*, Judge Panner wrote:

First, on September 28, 1985, Unocal suddenly changed its 89 octane unleaded gasoline to 87 octane unleaded in the Northwest only. Plaintiffs presented evidence that the discontinuance of the special grade and substitution of a commonplace product without a competitive price made it impossible for plaintiffs to compete. The dealers suffered complaints from customers whose cars did not perform well with the lower octane product and confusion as to why they should pay a higher price for a product available everywhere for substantially less. Unocal conducted no prior studies of the effect of the change on the dealers. There was evidence that Unocal recognized and ignored the risk of a dramatic shift in customer base and volume loss with the change to 87 octane without becoming competitive on the price.

There was evidence that Unocal knew that the 87 octane product needed to be priced much more aggressively that [sic] the 89 product to be competitive, but that Unocal kept its prices significantly higher than the competition. Nevertheless, Unocal expected the dealers to be competitive in the marketplace. Unocal representatives urged the dealers to boost volume of sales by selling gasoline at or below dealer cost, relying for profitability on Unocal's rebate program which awards volume growth. There was evidence, however, that the rebate program did not effectively support dealers, especially in times of falling sales volume. Although Unocal's 89 octane product had been the focus of its strong promotional campaign, Unocal did nothing to advertise the changeover to 87 octane or to become competitive

on price. There was evidence that Unocal reduced the quality of gasoline in the Northwest in order to maintain full supplies of higher octane fuel in California, where 89 octane sales continued. California is a more profitable region for the company. There was evidence that the Northwest was used as a test market for the company. The trial balloon turned out to be lead.

Second, on April 1, 1986, Unocal officially discontinued selling leaded premium and substituted unleaded premium. There was evidence that this change further eroded plaintiffs' niche in the marketplace. Before the gasoline could be sold as unleaded, the residue of lead needed to be flushed from Unocal's tanks and each dealer's tanks. Unocal representatives testified that they wanted to prevent competitors from knowing about the change until it was complete. Therefore Unocal deliberately deceived the dealers and the public, delivering unleaded gasoline to dealers in early February, 1986, but labeling and invoicing it at a higher leaded premium price. There was evidence of numerous customer complaints and dealer embarrassment. Many became suspicious and rumors of the change circulated. Unocal falsely denied that the change had occurred. At a meeting on March 6, 1986, dealers were told that the change would be made and that flushing would be required. However, the dealers were not told that the change had already occurred until the end of March, 1986.

Third, there was evidence that the company was too slow to respond to rapidly falling gaso-

> line prices during the first quarter of 1986. There was evidence that it is essential in a market where a few pennies per gallon is significant, that an oil company react to the market as fast as possible. Company officials admitted that at times in February and March, 1986, their prices were "out of the market." There is evidence from which a jury could conclude that other oil companies were keeping up with the market but Unocal was not meeting its responsibility.

Amos, 633 F. Supp. at 1030.

B. *The Amos Lawsuit.*

In 1986, forty-five Unocal dealers, forty-three from Oregon and two from Washington, brought suit in federal court, alleging various contract and tort claims. *See Amos v Union Oil Co. of California*, 663 F. Supp. 1027 (D. Or. 1987). After a trial on liability, the jury returned a verdict in favor of the *Amos* plaintiffs on their breach of the implied covenant of good faith and fair dealing claim, fraud claim, and tortious bad faith and unfair dealing claim. *See id.*[3] Unocal moved for a judgment notwithstanding the verdict, a new trial, or remitter [sic]. The court denied these motions and entered judgment for plaintiffs.

Soon after Unocal filed a notice of appeal, the parties began settlement negotiations. Prior to resolution of the appeal, the parties agreed to settle the

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[3] The jury found for Unocal on the tortious interference with business relationship claim, and the express contract regarding price claim. *See id.*

case on the condition that Judge Panner vacate the *Amos* judgment.[4] The Ninth Circuit remanded the case, and Judge Panner granted the stipulated motion for vacatur.

C. *The Modrich Lawsuit.*

In March 1986, Unocal filed an action for breach of contract against one of its Oregon dealers, Michael Modrich. *See Union Oil Company of California v. Modrich*, Case. No. 86-6125-ME (D. Or. Dec. 9, 1988). In turn, Modrich alleged four counterclaims: fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious breach of the duty of good faith and fair dealing. Relying on the doctrine of offensive collateral estoppel, Modrich moved for summary judgment on his counterclaims. The court denied the motion, concluding that the issues in *Modrich* were distinct from the issues decided in *Amos*. Thereafter, on December 9, 1988, a jury rendered a verdict in Unocal's favor on each of the counterclaims.

D. *The Bates lawsuit.*

In 1988, a group of twenty Oregon dealers initiated an action against Unocal based on the same facts as *Amos*. *See Bates v. Union Oil Co. of California*, Case. No. 88-0280-PA (D. Or. Mar. 16, 1989). The *Bates* plaintiffs moved for summary judgment seeking to estop Unocal from relitigating the claims tried to the jury in *Amos*. Judge Panner granted plaintiffs' motion, concluding that the factual

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[4] Apparently, Unocal hoped that such a vacatur would "avoid the potential preclusive effect of the *Amos* judgment in a later action." *See Bates* at 5.

issues had been "fully and fairly litigated" in *Amos* and that the vacatur did not impinge on the integrity of the jury verdict. *See id.*, slip op. at 8-16.

E. *This Lawsuit.*

On September 27, 1988, plaintiffs initiated this action against Unocal, alleging eight claims: (I) breach of an express contract as to product quality; (II) breach of an express contract as to price; (III) violation of the Uniform Commercial Code ("UCC") Open Price Provisions, RCW 62A.2-305; (IV) breach of the implied covenant of good faith and fair dealing; (V) fraud regarding product integrity; (VI) violations of the Washington Consumer Protection Act ("CPA"), RCW 19.86, *et seq.*; (VII) fraud regarding the rebate program; and (VIII) tortious breach of the duty of good faith and fair dealing.

Plaintiffs now move for partial summary judgment as to claims IV, V, VI, and VIII, arguing that the jury verdict in *Amos* estops Unocal from relitigating these claims. Unocal opposes the motion, and moves for partial summary judgment seeking to dismiss: claims I, VII, and VIII, all claims of Schatz; and certain claims of Hamilton and Waters.

III

DISCUSSION

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., T.W. Electrical Service, Inc. v. Pacific*

Electrical Contractors Association, 809 F.2d. 626, 630-631 (9th Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). Summary judgment is not appropriate if "a result other than that proposed by the moving party is possible under the facts and applicable law." *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983).

A. *Unocal's Motion for Partial Summary Judgment.*

1. *Claim I: Breach of express contract as to product quality.*

Several provisions of Unocal's Fuel Contract and Lease include recitations that Unocal produces "quality products." *See, e.g.*, Fuel Contract at ¶ 2; Service Station Lease at preamble, ¶ 2. Plaintiffs argue that these provisions reflect an express promise "to provide a unique and quality product attractive to the marketing niche that Unocal had mapped out for itself." Plaintiffs' Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment ("Plaintiffs' Memo in Opposition") at 9. Emphasizing the disastrous effects of Unocal's decision to change 89 unleaded to 87 unleaded, plaintiffs assert a claim that Unocal breached the terms of this agreement. *See* Complaint at ¶¶ 6-15.

Unocal moves for summary judgment, arguing that the vague provisions upon which plaintiffs rely do not constitute an express contractual duty to develop or provide plaintiffs with unique grades of gasoline. *See* Defendant's Memorandum of Authorities in Support of Defendant's Motion of Partial Summary Judgment ("Defendant's Memorandum in Support") at 12-14. The court agrees.

While the dealership contract does require Unocal to provide "quality" products, this language does not require Unocal to provide "unique" grades of gasoline. To the contrary, the Fuel Contract explicitly gave Unocal the "right to change or discontinue, from time to time, [the] brands or grades" of gasoline offered for sale by its dealers. *See* Fuel Contract at ¶ 3. Plaintiffs point to no contractual language which requires Unocal to treat all of its dealers equally. Moreover, Unocal provides unrefuted evidence that its 87-octane is a "quality" product. *See* Defendant's Memo in Support at 4-5. Therefore, this claim must be dismissed.[5]

2. *Claim II: Breach of express contract as to price.*

According to plaintiffs, Unocal's posted dealer tankwagon ("DTW") prices were consistently uncompetitive: "often 4 to 5 cents a gallon more than the average tankwagon price of the competitors." Plaintiffs' Memo in Opposition at 14. Based on these assertions, plaintiffs allege that Unocal breached its obligation to provide plaintiffs a "competitive" buying price.

This claim shall be dismissed. Plaintiffs point to no contractual language which supports a claim that Unocal promised to provide its dealers competitive prices. The lease agreement does require *plaintiffs* to maintain a clean and orderly business establish-

[5] If actionable at all, plaintiffs' "quality" allegations should be subsumed under the claim that Unocal violated the implied covenant of good faith and fair dealing. In fact, plaintiffs' counsel conceded at oral argument that plaintiffs would drop both express contract claims if the court granted summary judgment as to the implied covenant claim.

ment that is "completely competitive with service stations located in sales area served by [plaintiff's] station." Lease at ¶ 4. Such language, however, does not create an express contract relating to competitive pricing. Similar to plaintiffs' first express contract claim, the "competitiveness" allegations are more properly pursued under other causes of action: the UCC price claim, or the implied covenant claim. *See also supra* note 6.

3. *Claim III: Violation of UCC Open Pricing Provisions.*

Under the sales provisions of the UCC, parties are free to enter into a contract where the price is left open for future determination. *See* RCW 62A.2-305. Defining the duty of a party fixing the price, UCC § 2-305(a) provides: "A price to be fixed by the seller or by the buyer means a price for him to fix in good faith." In the case of a merchant, "good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." RCW 62A.2-103(1)(b). Plaintiffs allege that Unocal's prices violated the open price provisions.

Unocal advances essentially two arguments in support of dismissal of this claim. First, relying on *TCP Industries, Inc v. Uniroyal, Inc.*, 661 F.2d 542, 548 (6th Cir. 1981), Unocal argues that the court should conclude that Unocal's prices were commercially reasonable as a matter of law. *See* Defendant's Memo in Support at 16. Unocal's reliance on *TCP* is misplaced. The *TCP* court noted that, in some instances, evidence of a prior course of dealing may lead a court to conclude that a price below or above the market satisfies the reasonable requirement. *See*

661 F.2d at 548, *quoting* J. White and R. Summers, *Uniform Commercial Code* § 3-7 at 17 (2d ed. 1980). In the usual case, however, evidence regarding this question is properly presented for resolution by the trier of fact. *Id.* at 549. *See also Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9th Cir. 1981) (On a motion for summary judgment, a court is not permitted to weigh the evidence, pass on credibility, or speculate as to the ultimate findings of fact.).

Defendant attempts to avoid this rule, pointing to the Official Comment to UCC § 2-305 which provides that "[i]n the normal case a 'posted price,' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price' or the like satisfies the good faith requirement." Here, plaintiffs present substantial evidence to rebut any presumption of reasonableness. *See* First Affidavit of Michael J. Caro, Exs. 4-12. This evidence is more than sufficient to submit the price claim to a jury. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Unocal also argues, without citing any supporting authority, that plaintiffs have waived their rights to bring these price claims. Unocal notes that plaintiffs (1) never rejected any gasoline, (2) did not object to the DTW prices, and (3) renewed their dealership leases and fuel purchase contracts. While these facts are certainly relevant to the reasonableness inquiry, they do not constitute a waiver of the price claim.

4. *Claim VII: Fraud regarding the rebate program.*

As their Seventh Claim for relief, plaintiffs allege the [sic] "Unocal intentionally induced plaintiffs to lower their retail price of gasoline, and intended

plaintiffs to rely on representations that Unocal would maintain a dealer tankwagon price low enough to allow the dealers using the rebate to increase their sales enough to make up for the margin forfeited." Complaint at ¶ 57.

To prevail on a fraud claim, plaintiffs must prove:

> (1) Representation of an existing fact; (2) Its materiality; (3) Its falsity; (4) The speaker's knowledge of its falsity; (5) His intent that it shall be acted upon by the person to whom it is made; (6) Ignorance of its falsity on the part of the person to whom it is addressed; (7) The latter's reliance on the truth of the representation; (8) His right to rely on it; and (9) His consequent damage.

A.B.C. Packard, Inc. v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960).

Unocal moves for summary judgment, arguing that plaintiffs cannot satisfy the elements of common law fraud. In support, Unocal argues that any suggestions, or opinions, regarding the rebate program do not constitute representations of existing fact which would form the basis of a fraud claim. Moreover, Unocal notes that several plaintiffs concede that they did not rely on Unocal's suggestions regarding the rebate program. Plaintiffs respond that "[i]t is not Unocal's opinion that dealers should lower their prices to make up lower gas margins on growth that is the basis of the claim of fraud, rather it is Unocal's knowledge that its pricing was uncompetitive and that the rebate program was illusory that is the heart of the misrepresentation." Plaintiffs' Memo in Opposition at 22. *See also* Complaint at ¶ 57-58.

Reliance is an essential element of common law fraud. *See, e.g., Fritts v. McKay*, 58 Wn.2d 413, 420, 363 P.2d 808 (1961). Here, plaintiffs concede that they did not rely on the alleged fraudulent statements regarding the rebate program. *See* Defendant's Memo in Opposition at 9, 20; Defendants' Reply Memo at 18 (and citations therein). Therefore, this fraud claim must be dismissed.

5. *Claim VIII: Tortious breach of the duty of good faith and fair dealing.*

In addition to their contract claims, plaintiffs seek damages resulting from Unocal's "tortious violation of trust and good faith." Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment ("Plaintiffs' Memo in Support") at 15. In support, plaintiffs argue that the contracts between Unocal and its dealers created a special relationship—described with reference to principles of trust, agency, and partnership—and that Unocal violated the obligations of that relationship. *See id.*; Complaint at ¶¶ 60-64. Unocal seeks dismissal of this claim, arguing that Washington law does not recognize such a tort.

The tort for bad faith breach of this contractual duty is largely a creature of California law. Describing the evolution of this tort, one court noted:

> California law implies a covenant of good faith and fair dealing in every contract. *Seaman's Direct Buying Serv., Inc. v. Standard Oil*, 36 Cal.3d 752, 206 Cal. Rptr. 354, 362, 686 P.2d 1158, 1166 (1984). In limited circumstances, where a "special relationship" exists between the parties to the contract, breach of this covenant will give rise to a cause of action in tort. *Wallis*

v. Superior Court, 160 Cal.App.3d 1109, 207 Cal. Rptr. 123, 127-28 (1984). Originally, the doctrine was confined in large part to insurance contracts. *Id.* In *Seaman's*, the Court suggested that non-insurance contracts could be tortiously breached if they contained relationships with characteristics similar to those which allow a finding of tortious breach in an insurance contract. *Seaman's*, 206 Cal. Rptr. at 362-63, 686 P.2d at 1166-67.

Little Oil Co., Inc. v. Atlantic Richfield Co., 852 F.2d 441 (9th Cir. 1988). In recent years, California courts have limited the application of this tort, noting that enhanced damages are not appropriate for the breach of typical commercial contracts. *See, e.g., Quigley v. Pet, Inc.*, 162 Cal. App. 3d 223, 208 Cal. Rptr. 394 (1984); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal Rptr. 211, 234 (1988). *See also OKI America, Inc. v. Michrotech Int'l, Inc.*, 872 F.2d 312, 315-16 (9th Cir. 1989) (Kozinski, J., concurring) (criticizing this doctrine as a means of metastasizing contract disputes into torts). Moreover, applying *Seaman's* "special relationship" test, the *Little Oil* court concluded that the doctrine did not apply to a contract between gasoline refiners and franchise distributors. *See* 852 F.2d at 444-47.

As in California, recent Washington cases indicate that the bad faith doctrine is confined largely to insurance contracts. *See, e.g., Armstrong v. Safeco Ins. Co.*, 111 Wn.2d 784, 765 P.2d 276 (1988); *Tank v. State Farm*, 105 Wn.2d 381, 715 P.2d 1133 (1986); *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 473 P.2d 193 (1970). Nevertheless, in certain circumstances, a bad faith action is appropriate where a party breaches some specific fiduciary duty. *See, e.g., Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d

1170 (1980); *Harstad v. Frol*, 41 Wn. App. 294, 704 P.2d 276 (1988).

In an attempt to come within the ambit of this rule, plaintiffs define fiduciary capacity as "a relation implying and necessitating great confidence and trust on one part and a high degree of good faith on the other part." Plaintiffs' Reply Memo at 18, *citing* Blacks Law Dict. at 753 (1968 ed). Such tautological reasoning does little to advance the court's inquiry into the nature of the duties inherent in the Unocal-dealer relationship. Plaintiffs point to no Washington law to support their claim that gasoline companies owe specific fiduciary duties—as distinct from the duties enunciated in the dealership agreement—to their dealers.[6] Accordingly, plaintiffs bad faith claim must be dismissed. *See, e.g., Little Oil*, 852 F.2d at 447.

6. *Standing of plaintiff Schatz.*

In 1981, Randy Schatz formed a corporation, The Lane Group, Inc. ("TLG"). In May 1983, Schatz

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[6] Plaintiffs reliance on *Cherberg v. People's National Bank*, 88 Wn.2d 595, 564 P.2d 1137 (1977), and *Mersky v. Multiple Listing Bureau Olympia, Inc.*, 73 Wn.2d 225, 437 P.2d 897 (1968), is misplaced. In *Mersky*, the court did not recognize the existence of a general bad faith claim. Rather, the court held that the rules of agency obligate a real estate broker to exercise the utmost fidelity and good faith when dealing with a client, and that liability might flow from behavior inconsistent with these obligations. *See* 73 Wn.2d at 229. Even farther off the mark, the *Cherberg* court merely held that the wilful breach of a lease may also constitute a basis for liability in tort for intentional interference with business expectancies where the breach is premised on economic considerations outside the scope of the parties' obligations under the lease. *See* 88 Wn.2d at 602-604.

assigned his Fuel Contract and Lease to TLG. Since that time, Unocal has dealt with Schatz solely in his capacity as President of TLG, entering into renewal contracts with TLG and directing all invoices to TLG. In August 1989, TLG's board of directors adopted a resolution assigning the corporation's interest in this lawsuit to Schatz.

Unocal argues that Schatz is without standing to bring this action in his individual capacity. *See* Defendant's Memorandum in Support at 9-12. As the Supreme Court has noted:

> At an irreducible minimum, Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, . . . and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.

Valley Forge College v. Americans United, 454 U.S. 464, 472 (1982) (citations omitted). Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. *Id.* at 474-75; *see also Singleton v. Wulff*, 428 U.S. at 112. Plaintiffs must satisfy both the constitutional and prudential elements to assert standing. *See, e.g., McMichael v. County of Napa*, 709 F.2d 1268, 1269-70 (9th Cir. 1983).

Generally, a stockholder cannot sue as an individual, as distinguished from a representative of the corporation, where the basis of the cause of action is a contract between the corporation and a third person. *See, e.g., Sherman v. British Leyland Motors,*

Ltd., 601 F.2d 429, 439-40 (9th Cir. 1979); *Hunter v. Knight, Vale & Gregory*, 18 Wn. App. 640, 644-45, 571 P.2d 212 (1977); 13 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5927 (perm. ed. rev. 1980). This is the case even when the stockholder negotiated and executed the contract on behalf of the corporation. *See id.* However, because this rule is partially based on antiquated "privity" concerns, courts have recently noted that where a special duty is owed the stockholder he may bring an independent action. *See, e.g., Hunter*, 18 Wn. App. at 645-46.

Because there is no indication that Unocal owed Schatz any special duty independent of his stockholder status, Schatz is without standing to pursue this action. However, TLG, the appropriate party to press these claims, has assigned its interest in the suit to Schatz. Relying on *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (E.D. La. 1954), Unocal argues that the court should reject this belated assignment. The *Archie* court declined to recognize a transfer for reasons not present in this case, noting that the transfer was "without consideration" and a "simulation for the convenience of the parties." *See* 110 F. Supp. at 544. Although late in the day, the assignment from TLG to Schatz appears to be a valid transfer.[7]

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[7] Furthermore, even if the court concluded that the assignment is inoperative, the court would permit plaintiffs to amend their complaint for the limited purpose of substituting TLG as the proper party to pursue these claims. This decision is consistent with principles enunciated in the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 17(a). Given the close relationship between Schatz and TLG, such an amendment would not cause undue prejudice to Unocal.

Anticipating this result, Unocal seeks to limit plaintiffs' damages, arguing that they may not recover for mental suffering or emotional distress stemming from the TLG/Schatz claims. Although Unocal's argument is persuasive, *see, e.g., Smith v. Rodene*, 69 Wn.2d 482, 418 P.2d 741 (1966); *Tan Jay Int'l, Ltd v. Canadian Indem. Co.*, 198 Cal. App.3d 695, 243 Cal. Rptr. 907, 912 (1988) (assignee limited to rights of assignor corporation), it seems that this issue has been mooted by other portions of this court's Order. See *supra* § III.A.5.

7. *Admissions by plaintiff Hamilton.*

Prior to February 20, 1986, Tim Hamilton discovered that Unocal had delivered mislabeled unleaded gasoline. *See* Deposition of Tim Hamilton at 172, 177-81. Soon thereafter, he sold his gasoline station and terminated his Unocal dealership. Hamilton has testified that the unleaded deliveries had no impact on the sale of his business. *See id.* Pointing to these facts, Unocal argues that Hamilton may not pursue his fraudulent mislabeling and consumer protection act claims [8] since he cannot prove (1) reliance or (2) damages. The court is not persuaded by Unocal's arguments.

First, to state a claim for fraud, plaintiffs must show that they relied on some representation of fact. *See, e.g., Shook v. Scott*, 56 Wn.2d 351, 355, 353 P.2d 431 (1960). Responding to Unocal's reliance argument, plaintiffs note that Hamilton did not dis-

[8] Unocal also argues that Hamilton has waived his right to bring a rebate claim. Having already concluded that Unocal is entitled to summary judgment on the rebate claim, *see supra* § III.A.4, the court need not address the specific arguments regarding Hamilton.

cover the mislabeling until after the gasoline delivery of February 17, 1989. Therefore, plaintiffs argue that Hamilton's subsequent discovery is not grounds for dismissal; rather, it goes to the amount of damages resulting from Unocal's fraudulent conduct. *See* Plaintiffs' Memorandum in Opposition at 19. The court agrees.[9]

Second, as in all tort actions, damages is an essential element of a fraud claim. *See, e.g., A.B.C. Packard*, 275 F.2d at 71. Contrary to Unocal's claim, Hamilton's testimony does not show that he suffered no damage from the mislabeling. Rather, Hamilton testified that the unleaded deliveries did not have any financial impact after February 26, the day he ended his dealership relationship with Unocal. *See* Deposition of Tim Hamilton at 179-81, 186.

8. *Release executed by plaintiff Waters.*

In March 1988, Unocal offered $4,500 to Western Washington dealers who would waive their rights regarding the claims presented in *Amos*. After consulting with his retailing representative, Pat Waters executed a Release and Covenant Not to Sue whereby he agree to

> release and forever discharge [Unocal] of and from any, every, and all claims and causes of action of any kind, known or unknown, fixed or contingent, from the beginning of time to the date of this Release and Covenant, that he has,

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[9] At the very least, the parties' disparate allegations regarding the timing and extent of Hamilton's knowledge raise factual issues inappropriate for resolution on summary judgment. *See, e.g., Fredrick S. Wyle P.C. v. Texaco, Inc.*, 764 F.2d 604, 608 (9th Cir. 1985).

> had or may have against Unocal, arising out of any act, omission, matter or thing asserted against Unocal that could have been asserted against Unocal under any of the theories of law asserted by the plaintiffs in [*Amos*].

Waters Deposition, Exhibit 78. Accompanying this release, Waters sent a letter stating his understanding that the release related only to "that certain incident whereby your company misrepresented itself by intentionally delivering super unleaded to my business when super leaded had been ordered." Waters Deposition, Exhibit 75. *See also* Waters Dep. at 54-55. Subsequently, Unocal sent a signed copy of the release and a check for $4,500.00 to Waters.

Claiming that Waters breached the terms of this release by becoming a party to this lawsuit, Unocal seeks to be reimbursed the money it paid to Waters in consideration for his signing the release. In response, plaintiffs argue that Waters' supplementary writing limited the scope of the release to the fraud claim regarding mislabeling. Unocal contests this interpretation, asserting that the company never accepted Waters "unilateral modification" of the release.

Questions regarding formation and interpretation of releases are usually resolved under general contract principles. Under Washington law, an objective test is used to determine issues of contract formation. *See, e.g., Collins v. Thompson*, 679 F.2d 168 (9th Cir. 1982). To ascertain the terms of the agreement between Unocal and Waters, the court must first decide which materials make up the contract. General contract principles mandate that acceptance of an offer must always be identical with the terms of the offer.

See, e.g., Northwest Television v. Gross Seattle, 26 Wn. App. 111, 116, 612 P.2d 422 (1980). A purported acceptance that changes the terms of an offer in any material respect may operate as a counteroffer, but it is not an acceptance and does not consummate the contract. *See, e.g., id.*

Along with the signed release, Waters sent Unocal a letter setting forth his (erroneous) understanding that *Amos* only included claims regarding Unocal's delivery of mislabeled gasoline. Since the letter was inconsistent with the terms of the proposed release, Waters actions did not consummate the contract. *See, e.g., Northwest Television*, 26 Wn. App. at 116. Rather, when taken together, the letter and release constitute a counteroffer. *Id.* Upon signing the release and mailing the check to Waters, Unocal accepted the terms of the counteroffer.[10]

Based on this analysis, Waters is entitled to retain the money received from Unocal, but may not press any claims relating to Unocal's decision to deliver mislabeled gasoline. Apparently, plaintiffs' CPA claim is based exclusively on Unocal's mislabeling of gasoline. *See* Plaintiffs' Memo in Support at 22-24; Plaintiffs' Reply Memo in Support at 19. Therefore, Waters has waived his right to assert either a fraud regarding product integrity claim or CPA claim.

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[10] Unocal cannot argue that it did not receive, and scrutinize, Waters' letter before sending him the check. In fact, as noted by plaintiffs' counsel at oral argument, Unocal's files contained a copy of the letter in which relevant portions had been "highlighted."

B. *Plaintiffs' Motion for Summary Judgment.*

1. *Collateral Estoppel: Applicable Law and Elements.*

As a preliminary matter, the court must decide whether state or federal law determines the collateral estoppel effect of a prior judgment of a federal court sitting in diversity. Plaintiffs argue that federal standards apply; Unocal argues that Washington standards apply.

In federal diversity actions, collateral estoppel is generally an issue of the forum state's substantive law. However, the courts are divided over whether federal or state law determines the preclusive effect a federal court must accord to a prior federal diversity judgment. *See, e.g., Held v. Mitsubishi Aircraft Intern., Inc.*, 672 F. Supp. 369, 386 (D. Minn. 1987).

Here, the court will apply federal standards regarding collateral estoppel. Although the Ninth Circuit has yet to address this issue, the great weight of authority is that federal standards apply. *See, e.g., Stovall v. Price Waterhouse Co.*, 583 F.2d 537, 540 (5th Cir. 1981); *Kern v. Hettinger*, 303 F.2d 393, 340 (2d Cir. 1962); *Pine Top Ins. v. Public Utility Dist. No. 1 of Chelan County*, 676 F. Supp. 212, 213 (E.D. Wash. 1987). *See also* R. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976). Moreover, even if the court looked to state substantive law, the federal standards still apply because Washington law holds that the preclusive effect of a decision rendered by a federal court sitting in diversity is governed by federal law. *See, e.g., Davis Wright & Jones v. National Union Fire Ins.*, 709 F. Supp. 196, 198 (W.D. Wash. 1989); *Alcantara v. Boeing Co.*, 41 Wn.App. 675, 678, 705 P.2d 1222, *rev. denied*, 104 Wash.2d 1022 (1985).

Federal common law has established four prerequisites for collateral estoppel: (1) an issue identical to one previously litigated; (2) a final judgment on the merits; (3) the estopped party was a party, or in privity with a party, in the previous litigation; and (4) the estopped party had a full and fair opportunity to be heard on the issue. *See, e.g., Oldham v. Pritchett*, 599 F.2d 274 (8th Cir. 1979); *Pine Top*, 676 F. Supp. at 214 (E.D. Wash. 1987). Although the trial court has broad discretion in determining when to apply offensive collateral estoppel, the Supreme Court has cautioned that estoppel should not be applied: "[w]here a plaintiff could easily have joined in the earlier action or where the application of offensive collateral estoppel would be unfair to a defendant." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1978).

According to Unocal, plaintiffs' case for collateral estoppel fails for three reasons. First, Unocal argues that the vacated *Amos* judgment can have no collateral estoppel effect. Second, Unocal claims that it would be manifestly unfair to preclude Unocal's ability to defend the claims raised by the plaintiffs in this action. Finally, Unocal asserts that the factual and legal issues in this case are not identical to the issues tried in *Amos*.

2. *Final judgment on the merits.*

According to Unocal, a judgment which is vacated, for whatever reason, is deprived of its conclusive effect for purposes of collateral estoppel. *See* Defendant's Memo in Opposition at 27-28. Therefore, Unocal argues that the vacated judgment in *Amos* is of not force or effect. The court disagrees.

In support of its position, Unocal cites *Dodril v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985); *Universal City Studios v. Nintendo Co.*, 578 F. Supp. 911, 919 (S.D.N.Y. 1983); *Sutton v. Hirvonen*, 113 Wn.2d 1, —— P.2d —— (1989); *Marquart v. Federal Old Line Ins. Co.*, 33 Wn. App. 685, 689, 658 P.2d 20 (1983); 1B *Moore's Federal Practice* ¶ 0.416[2] at 517. The cases and Moore's commentary are not apposite; none address a situation where the vacatur was a condition of settlement.[11] In factual settings comparable to this case, courts have pointed out that "general expressions that only final judgments can ever have collateral estoppel effect are considerably overstated." *Chemerton Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190 (5th Cir. 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983), *quoting Kurlan v. C. I. R.*, 343 F.2d 625, 628 n.1 (2d Cir. 1965). Accepting this reasoning, several courts have concluded that a settlement conditioned on vacating an entered judgment does not reduce the

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[11] The Washington cases are of little guidance for, as discussed previously, the court must apply federal standards in this action. *See supra* § III.B.1. Moreover, Unocal's reliance on Moore's treatise is particularly misguided. The company points to a section regarding *res judicata* principles; however, when discussing issues of collateral estoppel, Professor Moore notes:

> [T]here has been an increasing judicial intolerance with efforts to avoid decisions made after fair consideration by shifting the scene to another courtroom. This has given way to a number of decisions, largely in the Second Circuit, refusing to permit relitigation of issues decided against the litigant in earlier litigation elsewhere, though the case in which the prior judgment was made has not gone to final judgment.

1B *Moore's Federal Practice* ¶ 0.441[4] at 745-46.

preclusive effect of that judgment. *See Chemerton*, 682 F.2d at 1187-92; *Angstrohm Precision Inc. v. Vishay Intertechnology, Inc.*, 567 F. Supp. 537, 540-41 (E.D.N.Y. 1983). *See also Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 440 F. Supp. 394 (D. Nev. 1977) (ruling on motion for summary judgment), 463 F. Supp. 94 (1978) (judgment), *vacated on other grounds and remanded*, 642 F.2d 339 (9th Cir. 1981).

Noting that there must be "judicial finality" before collateral estoppel can be invoked, the *Chemerton* court concluded:

> [T]he finality requirement does not necessarily demand the ministerial act of executing a judgment. It does not elevate form over substance in that fashion—the accurate definition of "finality" in the offensive collateral estoppel context is "fully litigated."

682 F.2d at 1191. Similarly, the Restatement (Second) Judgments has described a final judgment for purposes of issue preclusion as "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." Restatement (Second) Judgments § 13 (1980).

As noted by Judge Panner, the *Amos* verdict resulted from a fully litigated, fair, and correct adjudication on the merits. *See Bates*, slip op. at 10-11.

> The integrity of the [*Amos*] verdict is not in question. Unocal exhausted its challenges to the verdict in this court by motions for a directed verdict and judgment notwithstanding the verdict, new trial or remittitur. All these motions were denied. The jury has found facts against

> Unocal. Vacating the judgment, a ministerial act required to close a case after a jury verdict, has not effect on the finality of the jury's findings of fact. The factual issues I find collaterally estopped were fully and fairly litigated before the trier of fact.

Id. at 16. Therefore, this court concludes that the finality requirement is satisfied in this case.

The court recognizes that the *Chemerton* rule may have a chilling effect on post-trial settlement, particularly where a potential plaintiff is waiting on the sideline. Nevertheless, the court concludes that this policy concern is outweighed by the strong public interest in judicial finality. *See, e.g., Nestle Co. v. Chester's Market*, 756 F.2d 280, 281 (2d Cir. 1985); *Armstar v. United States Dist. for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1350 n.2 (9th Cir. 1986); *Bates*, slip op. at 14-16.

3. *Fairness to Unocal.*

The Supreme Court has noted that collateral estoppel should not be applied where it would work an injustice on the party against whom its application is sought. *See Parklane*, 439 U.S. at 330. The Court noted:

> If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. Still another situation where it might be

> unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

Id. at 330-31 (citations and footnotes omitted).

Relying predominantly on the second and third *Parklane* considerations, Unocal argues that it would be unfair to apply collateral estoppel in this case. These claims are without merit. First, Unocal argues that the *Amos* verdict was ambiguous and inconsistent with judgments in favor of Unocal. Having reviewed the *Amos* litigation, this court does not find the jury verdict to be ambiguous or internally inconsistent. Rather, as Judge Panner wrote, "Unocal prevailed before the jury on two of five claims. It simply lost on the others." *Bates*, slip op. at 11. Unocal also argues that the *Amos* verdict is inconsistent with the jury verdict in *Modrich*. This argument has already been addressed, and rejected, by Judge Panner. *See id.* at 11-13. And for good reason. When Modrich sought collateral estoppel based on *Amos*, Unocal's counsel explained that Modrich was not a Unocal dealer at the time of the grade change and unleaded conversion which were the bases for *Amos*. *See* Memorandum in Opposition to Defendant Michael Modrich's Claim of Collateral Estoppel. Unocal may not now claim that Modrich's counterclaims were substantially similar to the plaintiffs' claims in *Amos*.

Second, Unocal notes that the "dealer climate" in Oregon resulted in the unavailability of witnesses who would testify in Unocal's behalf. Having identified non-plaintiff Washington dealers to rebut the testimony of the plaintiffs in this action, Unocal ar-

gues that it would be unfair to not allow them the [sic] utilize this "procedural opportunity." *See* Unocal's Memo in Opposition at 29-30.

Contrary to Unocal's intimation, the availability of additional witnesses is not the type of "procedural opportunity" contemplated by the *Parklane* Court. Elucidating this consideration, the Court noted: "If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted." *Parklane*, 439 U.S. at 331 n.15. The federal court in Oregon was not an inconvenient forum; it did not deprive Unocal of an opportunity to undertake full and complete discovery or to call witnesses. Rather, it appears that Unocal has recently secured defense witnesses and now plans to utilize their testimony in this action. Whatever Unocal's reasons for not presenting such evidence in *Amos*, the court concludes that the availability of this evidence is no basis for relitigating the issues decided in *Amos*. *Id.*; *see also Consolidated Export, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980) (newly discovered evidence does not preclude collateral estoppel).

Finally, Unocal suggests that it would be unfair to apply the *Amos* verdict in this case in light of the fact that the company "sacrificed its appeal . . . and agreed to a settlement, resulting in the vacation of the *Amos* judgment." Defendant's Memo in Opposition at 30. The record is clear, however, that Unocal decided to settle *Amos* knowing full well that vacatur would not eliminate the risk of future collateral estoppel. In fact, prior to the settlement, Unocal noted

that "it is unlikely that either Circuit Judge Leavy or District Judge Panner could enter an order absolutely precluding any risk of collateral estoppel if the present case is settled." *Bates*, slip op. at 5.

4. *Identity of issues.*

In *Amos* and *Bates*, 73 Oregon Unocal dealers sued Unocal regarding the Northwest Grade Strategy. After a trial on liability, the jury returned a verdict in favor of the *Amos* plaintiffs on their breach of the implied covenant of good faith and fair dealing claim, fraud claim, and tortious bad faith and unfair dealing claim. *See Amos*, 663 F. Supp. 1027. Plaintiffs in this action move for summary judgment as to their claims for: breach of the implied covenant of good faith and fair dealing, fraud regarding product integrity, and violations of the CPA.[12]

General principles regarding collateral estoppel require that the issue to be decided in the subsequent action must be the same as the issue involved in the prior action. Unocal argues that the factual and legal issues presented by these claims are not identical to the issues presented in *Amos*.

(a) *General matters.*

As the party asserting estoppel, plaintiffs bear the burden of pleading and proving the identity of issues. *See, e.g., Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 (9th Cir. 1980). To sustain its burden "a party must introduce a record sufficient

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[12] Plaintiffs also requested summary judgment as to their claim for tortious breach of the covenant of good faith and fair dealing; however, the court has concluded that Washington law does not recognize such a tort. *See supra* § III.A.5.

to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *Id.* at 937, *citing United States v. Lasky*, 600 F.2d 765, 769 (9th Cir. 1979).

Plaintiffs provide uncontradicted evidence which establishes the following facts. In 1985 and 1986, Unocal adopted its "Northwest Grade Strategy"—a strategy applied consistently in Western Oregon and Western Washington. As determined by the jury in *Amos*, this strategy included (1) the knowing mislabeling of gasoline and (2) the unilateral decision to reduce the octane, but not the price, of its unleaded gasoline. At the time of these events, Unocal's dealership agreements were substantially identical in Oregon and Washington.

To blunt the effect of these similarities, Unocal points to several factual "distinctions" between the experience of its Oregon and Washington dealers. *See* Unocal's Memo in Opposition at 11-15. The court concludes that these distinctions are not sufficiently substantial to defeat plaintiffs' motion for summary judgment by estoppel.

For the most part, Unocal identifies economic and market distinctions which go to issues of damages, not liability. *See id.* at Nos. 2, 3, 4, 5, 9, 10, and 11. Somewhat more substantially, Unocal asserts that it conducted several Washington-only meetings in the fall of 1985 "pertaining to Unocal's marketing changes in 1985 and 1986." Deposition of David Larsen at ¶ 3. *See also* Affidavits of Lawrence J. Danberg, Danny L. Jake, Roy K. Johnson, Robbie K. Newcom, William C. Pettit, Jr., and John Shaffer. These affidavits contain scant information regarding the substance of these meetings. Most significantly,

they include no specific assertions that the deliveries and marketing changes at issue in this suit were actually discussed. Unocal's vague allegations regarding the meetings are not sufficient to defeat plaintiffs' motion for summary judgment.[13] *See, e.g., T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d. 626, 630-631 (9th Cir. 1987); *Estrella v. Brandt*, 682 F.2d 814, 819-20 (9th Cir. 1982).

(b) *Plaintiffs' claims.*

As a preliminary matter, the court concludes that Unocal is estopped from relitigating the specific claims decided to its detriment in *Amos*: the breach of the implied covenant of good faith and fair dealing claim, and the fraud regarding product integrity claim.

Additionally, plaintiffs move for summary judgment as to their claim under the CPA. *See* RCW 19.86. To prove such a claim, plaintiffs must establish five elements:

> (1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 785, 719 P.2d 531 (1986). According to plaintiffs, the findings of fraud in *Amos* satisfy the 5-element *Hangman Ridge* test.

In opposition, Unocal argues that plaintiffs cannot satisfy the first and third prong of this test. More-

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[13] When questioned at oral argument, Unocal's counsel could provide no additional information regarding the content and timing of these meetings.

over, relying on *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 54, 738 P.2d 665 (1987), Unocal claims that it should have an opportunity to show that its behavior was based on legitimate business concerns. Unocal's arguments are without merit.

Describing the evidence presented in *Amos*, Judge Panner stated that "Unocal deliberately deceived the dealers and the public, delivering unleaded premium to dealers in early February, 1986, but labeling and invoicing it at the higher leaded premium price." 633 F. Supp. at 1030. In response, Unocal claims that Judge Panner's opinion is not a "finding" on any issue. This argument misses the point; Unocal does not deny that the *Amos* jury found that the company had committed fraud by mislabeling gasoline. Such behavior clearly constitutes an unfair or deceptive practice under the CPA. *See, e.g., Travis v. Horse Breeders*, 111 Wn.2d 396, 406, 759 P.2d 418 (1988).

With respect to the third element, the *Hangman Ridge* test for public interest requires the court first to determine whether a case is more properly characterized as a consumer dispute or a private dispute. *See* 105 Wn.2d at 790 ("[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest."). The parties agree that this is a private dispute for purposes of the CPA.

Under the *Hangman Ridge* analysis, a private dispute can affect the public interest. The following four factors, although not dispositive in themselves, are indicia of an effect on public interest:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Did defen-

> dant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?

See Brotten v. May, 49 Wn. App. 564, 570, 744 P.2d 1085 (1987), *quoting Hangman Ridge*, 105 Wn.2d at 790-91. Because each of these questions must be answered in the affirmative, Unocal's vague suggestion that plaintiffs cannot satisfy the public interest requirement is meritless. Clearly, this action stems from a pattern of conduct in Western Washington (and Oregon) which had a substantial effect on the public interest. *See, e.g., Brotten*, 49 Wn. App. at 570.[14]

Finally, several Washington courts have noted that the section of the CPA dealing with unfair methods of competition, RCW 19.86.920, is not intended to prohibit "acts of practices which are reasonable in relation to the development and preservation of business, or which are not injurious to the public interest." *Sierracin*, 108 Wn.2d at 54, *citing State v. Black*, 100 Wn.2d 793, 802-03, 676 P.2d 963 (1984). By its terms, this consideration is limited to antitrust cases. Therefore, it is of no relevance to this action.

NOW, THEREFORE the court ORDERS as follows:

(1) Unocal's motion for partial summary judgment is GRANTED as to the breach of an express

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[14] In fact, recognizing the seriousness of this behavior and the potential for public harm, the Washington legislature has concluded that the misbranding of gasoline is a crime. *See* RCW 9.16.080-.090.

contract regarding quality claim (Claim I); the breach of an express contract regarding price claim (Claim II); the fraud regarding the rebate program claim (Claim VII); the tortious breach of the duty of good faith and fair dealing (Claim VIII); and Waters' fraud regarding product integrity claim (Claim V) and CPA claim (Claim VI). Unocal's motion is DENIED in all other respects.

(2) Plaintiffs' motion for partial summary judgment is GRANTED as to the breach of the implied covenant of good faith and fair dealing claim (Claim IV); fraud regarding product integrity (Claim V); and CPA claim (Claim VI). As to the tortious breach of the implied covenant of good faith and fair dealing claim (Claim VIII), plaintiffs' motion is DENIED.

DATED at Seattle, Washington this 20th day of October, 1989.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-35426

D.C. No. CVC-88-1233-BJR

TIM HAMILTON; CLIFFORD HOUSER; BOBBY MARTIN; DENNIS TRULOCK; PAT WATERS; THE LANE GROUP, INC.,

Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,

Defendant-Appellant.

ORDER

[Filed Dec. 2, 1991]

Before: WRIGHT, FARRIS and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.